No. 20444

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. D. MALLON, ET AL.,

Appellants

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The district court did not write an opinion. Its judgment appears at pages 196-203 of the record.[1/]

JURISDICTION

The district court had jurisdiction of this federal condemnation action under 28 U.S.C. sec. 1358. Final judgment

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1/ Volume 1 will be designated "R," while the transcript of evidence will be designated "Tr."

was filed on October 31, 1964 (R. 196). Appellants' timely motions for new trial and to amend the judgment were denied on March 15, 1965 (R. 204, 214, 248). On Friday, May 14, 1965, appellants dated a notice of appeal, which was marked received and filed by the clerk of the district court on Monday, May 17, 1965 (R. 249). For reasons discussed at pp. 11-15 of this brief, the notice of appeal was not timely filed and this court lacks jurisdiction to review the judgment which it would otherwise have under 28 U.S.C. secs. 1291 and 2107 and Rule 73(a), F.R.Civ.P.

QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction because the notice of appeal was untimely filed.

2. Whether certain of appellants' sales were correctly excluded.

3. Whether the Government's Wilder-Boswell and Wolfe-Petty sales were proper bases for the value opinions of Campbell and Rhodes.

4. Whether the district court in its discretion soundly limited cross-examination into the following collateral matters:

a. Membership in and practice of the American Institute of Real Estate Appraisers; and

b. Compensation of government witness Rhodes for his appraisal services.

5. Whether inspection of appraisal notes not consulted by Rhodes in his testimony was properly withheld.

6. Whether the rulings on the striking of an unresponsive answer of rebuttal witness Snelson and on the instructions were correct.

STATUTE AND RULE INVOLVED

28 U.S.C. sec. 2107 provides in pertinent part:

> Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.
>
> In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.
>
> * * * * *
>
> The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.
>
> * * * * *

Rule 73, F.R.Civ.P., Appeal to a Court of Appeals prior to the 1966 amendments, which are not relevant here, provided in pertinent part:

> (a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50 (b); or granting or denying a motion under Rule 52 (b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.
>
> * * * * *

STATEMENT

In March 1960, the United States condemned specified interests in approximately 3,595 acres, which included the fee title to 1,139 acres (Tract 104) owned by appellants, for use in the Black Butte Dam and Reservoir Project, in Tehama and Glenn Counties, California (R. 1, 19; Tr. 66). A declaration of taking was filed with the complaint.

Improvements of Tract 104 included an unoccupied ranch house, a cabin, three barns, two sheds, a storeroom, some fencing, and water pumps (Tr. 68, 101, 156-159, 213, 221-222, 393-395). The property had both irrigated and dry pasture land. Its historical use was for a livestock operation, which all valuation witnesses regarded as the property's highest and best use (Tr. 82, 165-166, 359, 428, 430, 675, 688). Stoney Creek, a stream which eventually emptied into the Sacramento River, divided the property into northern and southern portions of almost equal size; the stream itself accounted for some 170 acres (Tr. 405, 420, 630). On the southern portion of 488 acres (Tr. 791), 90 acres, which had no feed production history, could have been irrigated on the date of taking by a sprinkler system

installed in 1959 (Tr. 84, 107, 136, 407, 464); while on the northern portion, 77 acres had been flood-irrigated by pump from the creek, making a total of 167 of the 1,139 acres which had an irrigation history or potential (Tr. 84-85, 401-403, 630-631). Lava rock cap was described as covering some 200 acres on the buttes, prominent landmarks on the property (Tr. 426-427, 629-630, 677, 714).

The valuation testimony ranged as follows (Tr. 108, 205-207, 359, 463, 691):

For Appellants:	Valuation:
James D. Mallon (landowner)	$330,000
Walter H. Michael	307,000
Justin E. Smith	295,000
For the Government:	
Bert Campbell	$155,000
Richard M. Rhodes	150,000 2/

2/ In addition to sales of other properties, there was extensive, conflicting testimony concerning animal units and carrying capacity of Tract 104 as well as the sales (Tr. 88-97, 109, 134-135, 147-149, 184, 191, 193, 208, 227-234, 402, 428, 432, 434-435, 442, 444, 450-451, 462-465, 505, 525, 584, 603-615, 616-664, 696, 751-756, 800-801, 813-816, 832-842); soil analyses and comparisons (Tr. 160, 164, 170-179, 182, 19 222-225, 265, 395-400, 404, 406, 426-427, 447, 468, 527-528, 603-615, 616-664, 813-816, 828); and usefulness of the tract as a whole including difficulty in moving livestock across Stoney Creek from one portion of Tract 104 to the other and use of adjoining property not owned for such access purposes (Tr. 247, 329, 342, 348-352, 405-406, 428-430, 682-685, 788-789, 827, 845-847).

The jury verdict was in the amount of $155,000 (R. 195; Tr. 962). Judgment was entered thereon (R. 196-203), and appellants' motions for new trial, to vacate the verdict, and to amend the judgment were denied (R. 248). This appeal followed (R. 249). To avoid repetition, other details of the proceedings will be developed in the Argument section.

SUMMARY OF ARGUMENT

I

Jurisdiction of this appeal is lacking because the notice of appeal was not timely "filed." On the last possible day for filing a timely notice of appeal, appellants "dated" a notice of appeal which was marked "received" and "filed" by the district court clerk three days later. There is now no showing in the record of any circumstance which would change the date for filing a timely notice of appeal. On this state of the record, the appeal should be dismissed for lack of jurisdiction.

II

Even if jurisdiction were not lacking, consideration of the merits shows that the judgment below should be affirmed.

A. Comparable sales are the best evidence of value. Whether a sale is comparable is a matter for the discretion of the trial court. Here, the district court, in an exercise of its discretion, properly excluded prior to trial certain sales proposed to be used by appellants because the sales were either remote in point of time or physically dissimilar. The date of taking of Tract 104 was March 1960 and one of appellants' proposed sales occurred in 1954. There were other more recent sales regarded by the valuation witnesses as comparable. Three of appellants' proposed sales were physically dissimilar in that they involved, among other factors, 36, 40, and 80 acres respectively, whereas Tract 104 consisted of 1,139 acres. No abuse of discretion resulting in prejudice is shown from the district court's rulings.

B. The Government's Wilder-Boswell and Wolfe-Petty sales were admissible as one of the bases for the value opinions of the Government's witnesses, Campbell and Rhodes. These sales were the most comparable of the sales in evidence, as to time, location, use, and adaptability. That the properties were purchased for a use (potential subdivision) different fro

:he highest and best use of Tract 104 (ranching) is not legal-
.y disqualifying. Each seller evidently received his asking
›rice and there was no evidence that there was a market which
'ould have paid more. Indeed, sales prices of properties pur-
hased for potential subdivision are generally higher than
:hose paid for ranching.

C. The district court's miscellaneous rulings on
he extent of cross-examination, rebuttal testimony and in-
tructions were correct.

1. The district court validly confined cross-
xamination into membership and practice of the American Insti-
ute of Real Estate Appraisers. Membership and practice were
ollateral subjects and "such supervision of cross-examination,
nd its curtailment when over-extensive, lies precisely within
he discretion granted the trial court in such matters." Carl-
trom v. United States, 275 F.2d 802, 808 (C.A. 9, 1960).

2. Inquiry into the compensation of government
itness Rhodes for his appraisal services was also properly
estricted for three independent reasons. First, appellants
ere not unduly restricted. The fact of payment was permitted

to be shown. Second, such compensation was collateral to the issue in the case, the amount of just compensation owing the landowners for the taking of Tract 104. As a collateral matter, the extent of examination into it was addressed to the discretion of the trial judge. Third, admissibility of evidence is governed by federal, not state, law. Since the issue in this federal condemnation proceeding is just compensation under the Fifth Amendment, the California statutory law of evidence is not applicable.

3. These same reasons support the district court's ruling that appellants were not entitled to examine appraisal notes not consulted by government witness Rhodes in his testimony. In addition, the rule urged by appellants is inappropriate to notes of mental calculations and processes, such as an appraisal report. Also appellants were permitted to examine everything referred to by Rhodes in the course of his testimony.

4. Appellants misread the record in charging that Snelson's "opinion testimony" in rebuttal was stricken and that they were prevented from rebutting the comparability of two sales relied upon by the Government. Only a single

sentence was stricken, without objection or further action by appellants. The answer was unresponsive and concerned a matter not placed in issue by the Government's case. Moreover, the record shows that appellants explored fully with Snelson his opinion as to the comparability of the sales.

5. The rulings on the instructions were well founded. The district court instructed the jury that comparable sales were the best evidence of value. This was clearly correct, as was the instruction to assess the bases of an expert's opinion in determining the weight to be assigned the opinion. Objection to the latter was withdrawn by appellants.

Considered together, the instructions apprised the jury of that part of appellants' proposed instruction which was applicable to this case. The district court was not obliged to give appellants' proposed instruction literally.

ARGUMENT

I

JURISDICTION OF THIS APPEAL IS LACKING BECAUSE THE NOTICE OF APPEAL WAS NOT TIMELY FILED

The time provision in 28 U.S.C. sec. 2107 and Rule 73(a), F.R.Civ.P., supra, pp. 3 - 4, for the filing of a notice of appeal from a district court judgment to a court

of appeals is mandatory and jurisdictional. In United States v Molitor, 337 F.2d 917, 920 (1964), this Court said: "It is well established that a notice of appeal must be timely filed so as to confer jurisdiction upon this Court to consider such appeal. [Citations omitted.] Molitor's cross-appeal [filed 67 days after entry of judgment and seven days after the United States filed its appeal] must be and is hereby dismissed on the ground that this court is without jurisdiction to entertain it. * * *" An affidavit, stating that a notice of appeal delivered to a postal clerk on the last possible effective filing day (March 20, 1957) for transmission and delivery to the district court clerk and that the notice could and should have been delivered to the clerk that same day, was rejected, in Allen v. Schnuckle, 253 F.2d 195 (C.A. 9, 1958), where the notice was filed March 21, 1957, one day late. This Court noted (at 196-197): "The affidavit does not state, nor does it otherwise appear, that the notice was, in fact, delivered to or received by the clerk on March 20, 1957. Delivery thereof to a post office employee did not constitute a filing." Accord, Kahler-Ellis Co. v. Ohio Turnpike Commission, 225 F.2d 922 (C.A. 6, 1955); Lejeune v. Midwestern Ins. Co. of Oklahoma City, Okla., 197 F.2d 149-150 (C.A. 5, 1952); but see Ward v.

Atlantic Coast Line R. Co., 265 F.2d 75, 80-81 (C.A. 5, 1959), rev'd on other grounds, 362 U.S. 396, the court holding the notice was timely filed where the notice was mailed so as to reach the clerk seasonably and was in fact "received" but not marked "filed" because of the clerk's absence. 3/

In the case at bar, appellants' notice of appeal was not timely filed. Final judgment was filed on October 31, 1964 (R. 196). Appellants' motions for new trial and to amend the judgment were dated and mailed to government counsel November 10, 1964, and marked "filed" by the clerk November 13, 1964 (R. 204, 206, 213, 214, 218). The motions were thus timely "served" under Rules 5(b) and 59(b) and (e), and the running of the time for appeal terminated pursuant to Rule 73(a). The time for appeal under the express language of Rule 73(a) commenc

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3/ See also Lord v. Helmandollar, 348 F.2d 780, 782 (C.A. D.C. 1965), cert. den., 383 U.S. 928; Thomas v. United States, 328 F.2d 607, 608 (C.A. 9, 1964); Smith v. Stone, 308 F.2d 15, 1 (C.A. 9, 1962); Mondakota Gas Co. v. Montana-Dakota Utilities Co., 194 F.2d 705-706 (C.A. 9, 1952), cert. den., 344 U.S. 827; Slater v. Peyser, 200 F.2d 360, 361 (C.A. D.C. 1952); Shotkin v. Popenhager, 255 F.2d 100 (C.A. 5, 1958), cert. den., 358 U.S. 855; Gunther v. E. I. DuPont De Nemours & Co., 255 F.2d 710, 715 (C.A. 4, 1958); Raughley v. Pennsylvania R. Co., 230 F.2d 387, 389-390 (C.A. 3, 1956); Howard v. Local 74, Etc., 208 F.2d 930, 932-934 (C.A. 7, 1953); Watson v. Providence Washington Ins. Co., 201 F.2d 736, 737 (C.A. 4, 1953); Marten v. Hess, 176 F.2d 834, 835 (C.A. 6, 1949).

to run from the denial of the motions on March 15, 1965 (R. 248). Sixty days thereafter, on the last possible day for filing (Friday, May 14, 1965), appellants "dated"a notice of appeal which was marked "received" and "filed" by the district court clerk on Monday, May 17, 1965 (R. 249). There is now no showing in the record of any other action by appellants which would change the date for filing a timely notice of appeal. Nor is there record indication of the place from which mailed (if it was in fact mailed) to the clerk in Sacramento, California; the date it could reasonably have been expected to be received, filed, etc.; or any circumstance which would legally excuse the late filing of appellants' notice of appeal under the above statute, rules, and cases. 4/

Based on this state of the record, this Court lacks jurisdiction of the appeal because appellants' notice of appeal

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4/ Three recent Supreme Court opinions are distinguishable: Wolfson v. Hankin, 376 U.S. 203 (1964); Thompson v. I.N.S., 375 U.S. 384 (1964); Harris Lines v. Cherry Meat Packers, 371 U.S. 215 (1962). In each, there was some substantial equity in favor of the appellant, such as misplaced reliance on action by the trial court or adversary at a time when a timely notice of appeal could have been filed - as discussed in Lord v. Helmandollar, 348 F.2d 780, 782, note 3 (C.A. D.C. 1965), cert. den., 383 U.S. 928.

was not timely "filed" on or before Friday, May 14, 1965. The appeal should therefore be dismissed. We turn now to the merits of the case and show that, even if jurisdiction were not lacking, the judgment below should be affirmed.

II

ON THE MERITS, NO ERROR OF LAW WAS COMMITTED

A. Certain of Appellants' Sales Were Properly Excluded in the Exercise of the District Court's Discretion.-- Recent sales of comparable lands in the vicinity of the property taken are the best evidence of value. Whether such transactions are "comparable" can raise preliminary questions of the sales' nearness in time to the date of taking, geographi proximity, and similarity in location and in adaptability. United States v. Whitehurst, 337 F.2d 765, 775 (C.A. 4, 1964), and cases cited there; United States v. Featherston, 325 F.2d 539, 542 (C.A. 10, 1963); Bailey v. United States, 325 F.2d 571, 572 (C.A. 1, 1963). Such questions are of course addresse to the discretion of the trial judge. "Whether or not a sale constitutes a 'comparable sale' so as to constitute evidence of value is within the sound discretion of the trial court. Fairfield Gardens, Inc., supra [306 F.2d 167 (C.A. 9, 1962)];

Bailey v. United States, 1 Cir., 325 F.2d 571 [1963]." United States v. Eden Memorial Park Association, 350 F.2d 933, 935 (C.A. 9, 1965). 5/

Here, prior to trial appellants urged a pretrial procedure for simultaneous "disclosure of sales to be relied upon," objections, and hearing on objections "immediately upon the commencement of trial" (R. 178-179). Over government objection, District Judge Thomas J. MacBride's pretrial order directed such a procedure and recited that sales occurring after the date of taking would be presumptively inadmissible, but rebuttably so (R. 182-184). The parties exchanged such lists of sales on September 30, 1964, and filed objections (R. 185-192).

The Government's objections to three of appellants' proposed sales (involving 36, 40 and 80 acres, respectively, used for farming and not for livestock operations) were founded primarily on their not being physically comparable

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5/ See also United States v. Block, 160 F.2d 604, 607 (C.A. 9, 1947); Jayson v. United States, 294 F.2d 808, 810 (C.A. 5, 1961); United States v. 63.04 Acres at Lido Beach, 245 F.2d 140, 144 (C.A. 2, 1957); Ramming Real Estate Co. v. United States, 122 F.2d 892, 894 (C.A. 8, 1941).

to Tract 104 which consisted of 1,139 acres (R. 192; Tr. 58-59). Senior District Judge Chase A. Clark, presiding at the valuation trial by designation, excluded those three sales; [6] permitted use of one of appellants' sales of only 360 acres which occurred after the taking; permitted use of appellants' sale 35 to 45 surface miles away from Tract 104; [7] and ruled that sales five or more years prior to the

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6/ Appellants suggest that these sales should have been admitted because "these were sales of irrigated land" and some 167 acres of Tract 104 were irrigated (Br. 15). Admission was not mandatory for that reason. Tract 104 was taken as an entirety. Property taken is to be valued as a whole and its constituent parts considered only in the light of how they enhance the value of the whole. In other words, different elements of a tract are not to be separately valued and added together. United States v. Certain Parcels of Land in Rapides Parish, La., 149 F.2d 81, 82 (C.A. 5, 1945); Morton Butler Timber Co. v. United States, 91 F.2d 884, 888 (C.A. 6, 1937); United States v. Meyer, 113 F.2d 387, 397 (C.A. 7, 1940), cert. den., 311 U.S. 706; United States v. Jaramillo, 190 F.2d 300, 302 (C.A. 10, 1951). "If we attempt to cut a condemnation proceeding into slices, it bleeds." Phillips v. United States, 243 F.2d 1, 2 (C.A. 9, 1957).

7/ Appellants are thus in no position to censure admission of two government sales some 20 miles distant from Tract 104 as not being "nearby sales" in the "immediate vicinity" (Br. 13, 15, 26).

date of taking would not be admissible (Tr. 56, 58-62, 64). This ruling resulted in exclusion of one sale listed by each of the parties and accorded with appellants' own objection to a government-proposed sale occurring seven years prior to the taking, appellants stating: "It's somewhat remote in time. I think the sale was back in '53, which is some eleven years ago," i.e., eleven years from trial time (Tr. 46-47, 50).

After the district court announced his ruling on appellants' objection to the Government's proposed sale based on remoteness of time, appellants offered to withdraw their objection if it meant excluding their proposed 1954 sale (Tr. 50, 52), admitting "that it is primarily a matter of discretion for the court depending on the circumstances" (Tr. 51). The district court said it would permit authorities to be submitted relative to the five-year sale ruling and would

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8/ Appellants criticize this ruling as to the time element for admissibility of one of their eight proposed sales as an "arbitrary" exercise of discretion (Br. 13, 15). While they assert that they were unfairly restrained in presenting their case (Br. 11-18), appellants do not so characterize exercise of the same discretion on the same element which benefited them and resulted in the admission of their sale subsequent to the taking. The assertion is without record foundation.

permit raising the question again (Tr. 55, 63). Appellants' objections to other of the Government's proposed sales were "overruled without prejudice, and I'll reconsider it at the time it goes on" (Tr. 57, 62). After recess and before the presentation of testimony to the jury, appellants' counsel not having submitted authorities because "It was not my understanding that we were required to submit them within that time" (Tr. 197), the district court ruled "that comparable sales must be within five years of the date of taking * * *" (Tr. 64, 196-200).

Under these rulings, witnesses for each party were permitted to testify to sales within five years of the taking which they regarded as comparable. Although there were such sales, Mallon relied upon only two (Tr. 100, 102, 109) and Smith cited none.

It is manifest that the trial court was exercising its discretion as to the sales tendered by both parties on the question of comparability, based on factors of remoteness in time and of physical dissimilarity. Both parties' objections and arguments raised such questions which were resolved by the court, the resolution applying equally to each. On this record, no abuse of discretion resulting in prejudice is shown.

B. The Government's Wilder-Boswell and Wolfe-Petty Sales Were Proper Bases for the Value Opinions of Campbell and Rhodes.--The Government's witnesses Campbell and Rhodes regarded the Wilder-Boswell and Wolfe-Petty sales as being most comparable to Tract 104, but each testified to other sales and relied upon them (Tr. 436-469, 691-724). These two sales were some 20 miles from Tract 104 and adjacent to each other. Campbell described the 1959 Wilder-Boswell sale as involving $135,000 and 1,142 acres of ranch property bisected by a creek which did not flow year-round and of which 80 acres were irrigated (Tr. 455-457); he regarded this sale as "the most comparable as to size and use" (Tr. 458). Campbell then testified to the 1960 Wolfe-Petty sale as involving ranch property, $96,000, 960 acres of which 135 were irrigated, and a

creek (Tr. 458-462). These two sales were similarly relied upon by Rhodes (Tr. 701-712).[9/]

9/ Reliance on these sales by Campbell and Rhodes is to be contrasted to the bases of appellants' valuation witnesses. Michael complained (Tr. 156): "* * * I haven't found one piece of property that completely compared with the subject property." Nevertheless, he testified to the following sales (Tr. 181-195, 200-205, 291):

Prine-Arnett (1959; 4,189 acres; $300,000; seasonal livestock operation; not in the butte area);
Ball-Briggs (1958; 5,100 acres; $285,000; seasonal livestock operation; not in the butte area);
Michael-Newby (1960; 320 acres; $64,000; only sale with irrigated land); and
Gaskin-Fox (1956; 506 acres; $65,000; 30 air miles or 35 to 45 surface miles away).

Smith answered, "No, sir" when asked if he had any "sales that you can present to the jury in this Court upon which you can rely;" and answered, "You're correct," when asked whether "you refer to no particular sales, you refer to no breakdown of the property, you refer to no carrying capacity, you refer to no historical operation, and you refer to no specifics other than your opinion of market value * * *" (Tr. 365, 373). Mallon referred to the Prine-Arnett and Ball-Briggs sales (Tr. 100, 102, 109), but said that "there were no close sales in the area around where we were within a few miles" (Tr. 99) and that "there were no other properties that I would consider even comparable * * *" (Tr. 108).

Comparable sales as indicated above are the best indicia of market value.

These two sales were objected to by appellants prior to trial, on the grounds that they were physically dissimilar, too remote in distance, and in a different watershed subject to different economic and climatic conditions (R. 190). At the hearing prior to trial, appellants added that both had been purchased for subdivision purposes (Tr. 48, 61-62). Appellants' objection to these sales was "overruled without prejudice, and I'll reconsider it at the time it goes on" (Tr. 57). The district court further specified that its "rulings will be made without prejudice to raising the question again" (Tr. 62).

Appellants did not renew their objections to these sales during the trial, nor move to strike Campbell's and Rhodes' value opinions because they rested on these sales. Rather, appellants' tack was to attempt to show by cross-examination and by rebuttal testimony that the sales we not "comparable." To this end, lengthy and complete cross-examination and rebuttal were permitted (Tr. 494-497, 529-55 567-571, 746-778, 786-800, 811-812, 820-823, 860-863, 868-87 868 second series of pages - 882). For example, appellants on rebuttal called purchasers involved in the Wilder-Boswell

and Wolfe-Petty sales. They testified that they had purchased the properties for subdivision purposes (Tr. 820-822, 860-863). On cross-examination the purchaser in the first sale admitted that after the sale the property continued to be used for a livestock operation and that subdivision plans had not yet materialized (Tr. 824). The purchaser in the second sale answered "No" when asked "because you bought it for potential subdivision, sir, do you think you paid less than the market value for it" (Tr. 864).

The gravamen of appellants' argument on appeal is that property purchased for a use different from the admitted highest and best use of the property taken cannot as a matter of law qualify as a "comparable sale" (Br. 18-27). We know of no such rule and submit that in this case error cannot be validly predicated on the admission of these sales: In United States v. Whitehurst, 337 F.2d 765 (C.A. 4, 1964), five of the ten sales relied upon by the government appraiser did not contain mineral deposits. The property taken there did. The court said (at 775): "Possibly the Commission was laboring under the impression that these sales were not comparable because the lands were sold as farm land and not as borrow pits. If so, it was grossly mistaken." It then declared (at 775):

> Real property may be unique and the comparable sales too few to establish a conclusive market price, "[b]ut that does not put out of hand the bearing which the scattered sales may have on what an ordinary purchaser would have paid for the claimant's property." United States v. Toronto, Hamilton & Buffalo Nav. Co., 338 U.S. 396, 402, 70 S.Ct. 217, 221 (1949). 10/

The record here demonstrates that the two sales were patently the most comparable in the testimony. Also their comparabili

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10/ Union Electric Co. v. Jones, 356 S.W.2d 857 (Mo. S.Ct. 1962), selectively quoted by appellants (Br. 25-26), actually subverts appellants' suggestion. The court there stated the rule (at 862) that "The admissibility of such evidence depends upon the nearness of the sale in point of time and the proximity of the property, of the similarity in location, and in the use to which the property is adaptabl" and approved rejection of the Sutterfield sale because "there was no showing that appellants' land was adaptable for mining yet the Sutterfield land was sold for mining purposes." Here, the two sales were shown to be "adaptable" for livestock operations. There might be some substance to appellants' argument in a case where the properties involved in the sales were purchased for a lower economic purpose than the property taken or where the other properties' use at the time of purchase was different from that of the property taken. But that is not appellants' case and record.

was a matter for the discretion of the district court. See authorities, supra, pp. 15-16, and note 5. 11/

Further, appellants failed to renew their objections to the sales and reliance thereon by the government appraisers. Appellants, evidently having decided to take the matter to the jury, were accorded full right of cross-examination and rebuttal to discredit reliance on the two sales and can now show no prejudice with regard thereto. The jury was apparently impressed that appellants' own rebuttal witnesses admitted that the properties were ranch properties both at the time of and after the purchases, and that subdivision plans had not been realized. The jury may and should have been similarly impressed with one purchaser's feeling that, though the property was purchased for a different use, market value had been paid. Finally, there is no record showing that sales prices of properties purchased for potential subdivision were less than those paid for ranching. While this record does not so show, just the opposite is generally true, and, arguably, appellants were benefited by such sales.

11/ United States v. Michoud Industrial Facilities, 322 F.2d 698 (C.A. 5, 1963), relied upon by appellants (Br. 23-25, 27), is not to the contrary. The sales there were suspect because the record showed reliance on sales "which neither by location nor quantity of land involved or other characteristics bear any resemblance to each other in the market." 322 F.2d at 706. That describes most of appellants' market data, not the two sales under discussion.

Just as such sales were admissible in United States v. Whitehurst, 337 F.2d 765, 775 (C.A. 4, 1964), because "All the indicia of an arm's length transaction were present," each seller "evidently received his asking price and there is no evidence that there was a market which would have paid him more," so, here, the two sales were admissible as one of the bases for Campbell's and Rhodes' value opinions.

C. The District Court's Miscellaneous Rulings on the Extent of Cross-Examination, Rebuttal Testimony and Instructions Were Correct.--1. Cross-Examination into Membership and Practice of the American Institute of Real Estate Appraisers was Validly Confined. As a general rule, the trial court possesses vast discretionary control over the extent of cross-examination, the degree of control dependent on particula subjects and circumstances. Even where the subject is evidence directly related to value, such as the condition of the property, the trial court has wide discretion in limiting the scope of cross-examination. United States v. Block, 160 F.2d 604, 607 (C.A. 9, 1947); Stephens v. United States, 235 F.2d 467, 471 (C.A. 5, 1956); Foster v. United States, 145 F.2d 873 875 (C.A. 8, 1944); Ramming Real Estate Co. v. United States,

122 F.2d 892, 894-895 (C.A. 8, 1941). And while generally cross-examination for impeachment purposes is not limited to the scope of the direct examination, the trial court's discretion also extends to restriction of cross-examination for such purposes, as declared in Carlstrom v. United States, 275 F.2d 802, 808 (C.A. 9, 1960):

> Appellants next sought to impeach the credibility of the witness Hallock's testimony by showing that some of the repairs he had suggested as "necessary" as of May 1, 1953, had not in fact been made down to the time of trial. Appellants proved this fact, and developed many others on cross-examination. Finally the court called a halt, pointing out that whether or not repairs were made, the property could still be used, and that "this question of usefulness is a matter of degree." We think such supervision of cross-examination, and its curtailment when over-extensive, lies precisely within the discretion granted the trial court in such matters.
>
> Appellants cite no cases wherein such action by the court has been deemed error, and we think for good reason. United States v. Block, 9 Cir., 1947, 160 F.2d 604, 607. 12/

Here, on direct examination, government appraisal witness Campbell's qualifications were established (Tr. 374-385).

12/ Similarly, appellants produce no such authorities (Br. 37-38).

It was developed that he is a member of the American Institu of Real Estate Appraisers (Tr. 379). He related the Institute's qualifications for membership, functions, publication and educational endeavors, and stated without objection that when Institute members testify in court and there is a substantial difference in their valuation testimony, each must submit his appraisal to the Institute for review and disposition (Tr. 380-384). When asked by government counsel, "Unles you are a member of the Institute, then there is really no governing control over a man who merely calls himself an appraiser, is that correct?" (Tr. 385), Campbell did not agree, contrary to appellants' version of the transcript (Br 33-34, 36), but said, "Well, there are other organizations h might belong to that would have ethics that would tend to govern him. As I say, the American Institute is most strict in governing their members" (Tr. 385). This was the extent of reference to the matter on direct examination.

On cross-examination, inquiry was made into Campbell's appraisal qualifications and experience, employment and compensation for appraisals for the Black Butte Project, employment in other cases by both condemnors and condemnees, testimony in court against the United States in only one case, and appraisal teaching experience (Tr. 470-479). Appellants then began questioning on the Institute's requirement that members submit their appraisals for review where there is a substantial difference in their valuation testimony (Tr. 480-481). Appellants developed that appraisals often vary, regardless of the appraisers' membership in organizations; and that Campbell has submitted appraisals to the Institute three or four times, once involving a tract in this project (Tr. 482-483). Mentioning a specific tract and difference in amount of money, appellants wanted to know whether "you and an appraiser on the Lampley property differe [sic] by over $100,000" (Tr. 483). The Government objected to broaching this subject in the presence of the jury, explaining that reports had been made, that that case "is now presently on appeal," and that the appraisers' valuation difference in the Lampley case is completely improper and

immaterial in this case where the property and appraisers are different (Tr. 484). The court agreed (Tr. 484): "We're not going to try any other condemnation suits. We've got our hands full with this. The objection will be sustained." Appellants said, "I did wish to ask the witness about the amount of disparity. I don't care about any other detail on it" (Tr. 484). The Government asked for, and received, permission to determine whether that matter had been reported to the Institute and whether the Institute was reserving action until it is resolved by the courts, the court having cautioned: "Well, if you ask him, chances are you'll be opening the gate here. But you go ahead if you want to" (Tr. 485).

Upon resumption of cross-examination, appellants asked Campbell "whether your figure was $108,000 and the other gentleman's figure was $220,000," to which the Government again objected (Tr. 486). Appellants believed the Government "has opened the door as your Honor suggested might be the situation" (Tr. 486). The court stated (Tr. 486, 487): "Well, I think I'll close the door on this question. I don't its proper" and "I won't open the trial of some other case.

I think the Court and Jury and lawyers have their hands full with this one."

Subsequently, out of the presence of the jury (Tr. 558), appellants made an offer of proof concerning "an incident where he [Campbell] was an appraiser for the Division of Highways of the State of California, and while in the course of testimony made an offer to purchase property which was a remainder on the partial taking, a matter which had come up in a previous or several previous trials" (Tr. 559). Appellants here said that Campbell had made an offer in open court in that State case to purchase the remainder, to "create some evidence in the case," and that the Institute, to which the incident had been reported, "had absolved the witness of any criticism" (Tr. 560; Br. 37). The court declined to have cross-examination on this subject, on grounds that it would "start another trial * * *" and "We'd have to bring all that evidence in * * *" (Tr. 560-561). A colloquy between government counsel and the court followed (Tr. 561):

> MR. RENDA: If your Honor please, so that the record is clear, as Mr. Blade has begun the trouble of making an offer of

> proof, I think the record should reflect that this matter was initially brought up in another matter tried by another attorney before Judge Carter, in which I was the attorney for the government, and that Mr. Blade has the transcript of that proceeding. And Judge Carter at the time allowed it because neither myself nor Mr. Campbell knew what the testimony was going to be or the questions being asked.
>
> However, after it was asked, Judge Carter did state that he felt this was opening up an entire matter, and if he had known the direction, he would not have allowed it. Now, subsequently in the case that your Honor tried, Cass Hamilton in this district --
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> THE COURT: I remember that.
>
> MR. RENDA: this matter was brought up and was completely gone into in the court's presence, so your Honor was well aware of the circumstances, when you made the ruling prior to this offer of proof.

The subject of Institute membership and the procedur for reporting differences in members' valuation testimony was not raised by the Government in the direct examination of its other appraisal witness, Rhodes. In the course of relating his qualifications and experience as an appraiser, Rhodes merely stated that he was a member of the Institute (Tr. 671-672). On cross-examination of Rhodes, however,

it was appellants who broached the subject, again over Government objection, and the court adhered to its prior ruling (Tr. 732-735).[13/]

The trial court was clearly correct in limiting cross-examination on this collateral subject, observing that further inquiry would prolong this trial (especially where the trial court was familiar with the subject from a previous trial and where apprised that the matter involved in part other judicial proceedings, not all then resolved), and that inquiry would "start another trial * * *" (Tr. 560-561). If Institute membership and practice were an issue in the case, it plainly was remote and was created in large measure by appellants. As in Carlstrom (275 F.2d at 808), "such supervision of cross-examination, and its curtailment when over-extensive, lies precisely within the discretion granted the trial court in such matters." No abuse of discretion and no prejudice are shown, we submit, as to a necessity vital to the jury in weighing the opinions of the witnesses.

13/ There is thus no substance to appellants' charge that "the Government deliberately created an issue concerning the responsibility of expert witnesses * * *" and, as previously noted, p. 28, appellants misquote the record in attributing a "statement" to government counsel concerning Institute supervision of its members (Br. 33-34, 36; Tr. 385).

2. Inquiry into the Compensation of Government Witness Rhodes for His Appraisal Services Was Properly Restricted. The district court's ruling as to appellants' attempted inquiry into the compensation actually paid government witness Rhodes for his appraisal services, was not erroneous for three independent reasons. First, appellants were not unduly restricted concerning this matter. Specifically, appellants were permitted to establish on cross-examination of the witness the fact that the witness was being paid (Tr. 732, 785). In fact, the government stated in the presence of the jury that it would stipulate that its witnesses were being paid (Tr. 732, 782-783). The Government, did, however, object to further inquiry concerning the precise amount of compensation as not being material or relevant (Tr. 732, 782-783). The district court agreed, saying, "I think he can testify he's being paid for his services, and that's as far as you should go" and "Well he's testified that he's paid, and I think that is all that is necessary" (Tr. 732, 785). If the compensation of the witness were necessary to indicate "motive, bias or interest" under the rule contended for by appellants (Br. 38), the answer

is that the fact of compensation was permitted to be shown, and it was unnecessary to go beyond that fact into a purely collateral matter and inquire into the amount of compensation, to accomplish appellants' stated purpose.

Second, the ambit of examination into collateral issues is addressed to the sound discretion of the trial judge, as appellants' own authority acknowledges (Br. 41). United States v. 25.406 Acres in Arlington County, Va., 172 F.2d 990, 995 (C.A. 4, 1949), cert. den., 337 U.S. 931.[14/] The issue in this case was the amount of just compensation owing the landowners for the taking of Tract 104 -- not the amount paid the appraisal witness for his services. McCandless v. United States, 298 U.S. 342, 348 (1936). It was sound discretion here, we believe, to "eliminate proof of collateral issues which would tend to obscure the real issue, namely, the value of the property." Hickey v. United States, 208 F.2d 269, 277 (C.A. 3, 1953), cert. den.,

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14/ See Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656, 670 (C.A. 9, 1963), cert. den., 375 U.S. 922; Basic Books, Inc. v. F.T.C., 276 F.2d 718, 721 (C.A. 7, 1960); Southern Farm Bureau Cas. Ins. Co. v. Mitchell, 312 F.2d 485, 499-500 (C.A. 8, 1963); McNenar v. N.Y., Chicago and St. Louis R. Co., 20 F.R.D. 598, 600-602 (W.D. Pa. 1957).

347 U.S. 919. [15/] As stated in McCormick, Evidence (1954) sec. 40, pp. 85-86:

15/ Appellants argue that the additional inquiry should have been allowed because Rule 43(a), F.R.Civ.P., makes the federal or state rule favoring the reception of evidence absolutely controlling and the California rule allows questioning of "any witness as to all expenses and fees paid or to be paid to such witness by the other party." Cal. Code of Civ. P., sec. 1256.2, repealed by Cal. Stats. 1965, c. 299, p. , sec. 21; see Cal. Evidence Code sec. 722(b).

Appellants' argument completely ignores the trial court's discretion on such a matter, and would deprive the court of any leeway by compelling selection of the local rule in all situations (Br. 39-41). We know of no such intent by the rulemakers in adopting Rule 43(a). Indeed, with express reference to Rule 43(a), the Third Circuit stated, in a recent federal condemnation case, United States v. 60.14 Acres in Warren and McKean Counties, Pa. (Seibel) (C.A. 3, No. 15313, June 24, 1966) not yet reported:

> The increasing recognition of the principle which confers on the trial judge a wide discretion in dealing with evidence is based in large part on the federal rule that admissibility and competency are to be determined on practical considerations. This discretion is a recognition of the variations in individual circumstances. * * *

See also United States v. Certain Interests in Property in Borough of Brooklyn (Fort Hamilton), 326 F.2d 109, 114 (C.A. 2, 1964), cert. den., 377 U.S. 978; Westchester County Park Commission v. United States, 143 F.2d 688, 693-695 (C.A. 2, 1944), cert. den., 323 U.S. 726.

> It seems that if the witness fully admits the facts claimed to show bias, the impeacher should not be allowed to repeat the same attack by calling other witnesses to the admitted facts. And it is held that when the main circumstances from which the bias proceeds have been proven, the trial judge has a discretion to determine how far the details, whether on cross-examination or by other witness, may be allowed to be brought out. After all, impeachment is not a central matter, and the trial judge, though he may not deny a reasonable opportunity at either stage to prove the bias of the witness, has a discretion to control the extent to which the proof may go. He has the responsibility for seeing that the sideshow does not take over the circus. * * *

Finally, admissibility of evidence must be determined under federal law and not state law in a condemnation proceeding brought by the United States. In United States v. 93.970 Acres, 360 U.S. 328, 333, note 7 (1959), the Supreme Court, referring to the "conformity" statute, said: "And insofar as it required such procedural conformity it was clearly repealed by Rule 71A, Federal Rules of Civil Procedure, at the time this suit was brought. It follows that federal law was wholly applicable to this case." Since federal law controls both substance and procedure in federal

condemnation proceedings,[16] the California statutory law of evidence is not operative. This is necessary, because the issue is just compensation under the Fifth Amendment. The federal standard very often differs from state standards of compensation and those standards are most frequently enforced by rules as to admission or exclusion of evidence. 60.14 Acres in Warren and McKean Counties, Pa. (Seibel), supra.

For each of these reasons, inquiry into the compensation paid the witness Rhodes for his appraisal services was properly restricted.

3. Inspection of Appraisal Notes Not Consulted by Rhodes in His Testimony Was Properly Withheld. Also for the reasons just discussed, appellants were not entitled as of right to examine appraisal notes not consulted by Rhodes in his testimony. Squarely in point is Phillips v. United States, 148 F.2d 714, 717 (C.A. 2, 1945):

> Appellants complain that they were denied the right to inspect the appraisal report which Bowen used to refresh his recollection.

16/ 360 U.S. at 332-333 and notes 6 and 7. Cf. United States v. Featherston, 325 F.2d 539, 542 (C.A. 10, 1963); United States v. Smith, 355 F.2d 807, 812 (C.A. 5, 1966).

> It is said that this would have shown that Bowen failed to consider the 1942 purchases for Curtiss. The right to inspect such data is not absolute, but lies within the discretion of the trial court. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 233, 60 S.Ct. 811, 84 L.Ed. 1129. Moreover, the data shown in this appraisal appear elsewhere in the record. * * *

Cf. Goldman v. United States, 316 U.S. 129, 132 (1942); see McCormick, Evidence (1954) sec. 9, pp. 14-18. The district court in its discretion therefore was not obliged to permit unlimited examination, and the California statutory rule of evidence was not controlling. Cal. Code of Civ. P. sec. 2047, repealed by Cal. Stats. 1965, c. 299, p. , sec. 126; see Cal. Evidence Code secs. 771 and 1237. 17/

In addition to those reasons, appellants' arguments and authorities (Br. 27-32) are addressed to situations where materials are either handed to the witness or which he actually consults in the course of histestimony, for purposes

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17/ It is not even clear that the California courts would construe the local statutory rule to reach the result contended for by appellants in this case. Smith v. Smith, 135 Cal.App.2d 100, 105-106, 286 P.2d 1009, 1012 (1955); People v. Gallardo, 41 Cal. 2d 57, 66-68, 257 P.2d 29, 35-36 (1953); People v. Jones, 2 Cal. Rptr. 305, 308, 177 Cal. App.2d 420, 423-424 (1960).

of "refreshing present memory" or "refreshing past recollection (with all the subtle distinctions attendant thereto) as to "facts." The rule urged by appellants is inapposite to notes of mental calculations and processes, such as an appraisal report. Cf. C. W. Hull Co. v. Marquette Cement Mfg. Co., 208 Fed. 260, 265 (C.A. 8, 1913).

This Court has held that it is permissible to limit inspection of a memorandum book to the parts consulted. Brownlow v. United States, 8 F.2d 711 (C.A. 9, 1925). "[T]he defendants were entitled to see only those parts of the paper used by the witness." United States v. Easterday, 57 F.2d 165, 167 (C.A. 2, 1932), cert. den., 286 U.S. 564. Here, appellants were accorded examination of everything referred to by Rhodes in the course of his testimony (Tr. 724-730, 751-752, 777-780, 783-785, 791; see Tr. 490-493, 665). No error and prejudice, we submit, are shown by refusal of unlimited inspection in this case.

4. Snelson's Opinion Testimony Was Not Stricken. While appellants charge error "in striking the opinion testimony of the witness Snelson" (Br. 41), their entire discussion, spread over six printed pages, is a quarrel relating

the striking of a single sentence of the witness on rebuttal (Br. 41-46). The single sentence on rebuttal was expression of an opinion answer, unresponsive to the question asked, that the Tract 104 area was "far superior to anything in the Red Bluff area as far as producing feed for livestock goes," the latter area being the location of two of the sales (Wilder-Boswell, Wolfe-Petty) relied upon by government witnesses (Tr. 874-875).

No error was committed: (1) The comparability of the two areas as such and "anything in the Red Bluff area" was not inquired into by the Government in presenting its case. Nor was that subject broached by appellants in cross-examining government witnesses. Hence, such inquiry by appellants on rebuttal was improper and, if permitted, would have introduced a purely collateral and irrelevant matter into this trial. (2) The striking of the unresponsive answer was not objected to by appellants, who, with opportunity for redirect examination, excused Snelson and did not solicit a responsive answer comparing the properties (Tr. 874-875, 868 second series of pages). Further, this entire matter was ignored by appellants in their motion for

new trial and related papers (R. 204-213). The specification of error is thus not properly before this Court.[18] (3) Most persuasive is the fact that the striking of this single sentence has no relation to, and does not support, appellants' argument on appeal that they were somehow prevented from rebutting the comparability of the two sales (Br. 41-46). On the contrary, appellants had full opportunity without objection to explore with Snelson on rebuttal his opinion that the Wilder-Boswell and Wolfe-Petty sales -- not areas -- were not comparable to Tract 104. As to the first sale, Snelson stated (Tr. 868, 869, 870): "But the range land in general is of very mediocre caliber: short growing season in the Spring * * *"; "Well, it would be pretty hard for a man and a family to make a living on it without outside rentals or other property;" and "Well, after I moved onto the ranch, why the irrigation well provided insufficient water to irrigate the irrigated pasture that they had on the property at that time." As to the second, he said (Tr. 873): "Well, it is ju

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18/ United States v. Benning, 330 F.2d 527, 535 (C.A. 9, 1964); Pehrson v. C. B. Lauch Construction Co., 237 F.2d 269, 270-271 (C.A. 9, 1956).

a winter range of very low caliber. It's not very good feed range;" and "Oh, no, no, it [the sale property] would not be" an economic unit.

Appellants' statement [19] and argument [20] are thus simply based on misreading of the record and an attempted use of a rule of law absent facts warranting application of the rule (Tr. 865-875, 867-868, second series of pages).

19/ Br. 44: "Yet, the trial court at the suggestion of government counsel struck the opinion of the obviously well qualified witness Snelson simply because it constituted an opinion concerning the quality and comparability of the two primary government sales to the subject property."

20/ Br. 44-46, citing Hickey v. United States, 208 F.2d 269, 276-277 (C.A. 3, 1953), cert. den., 347 U.S. 919, for the rule that prohibition of rebuttal of important elements of an adversary's case can be error.

5. The Rulings on the Instructions Were Well Founded. Appellants' final plaint on appeal (Br. 46-49) pertains to instructions given by the district court and to refusal to give one of appellants' proposed instructions. The part of two instructions complained of are as follows (Br. 10, 48; Tr. 945, 949):

> [B]ona fide sales of comparable properties may [made?], within a reasonable time, before the date of the valuation of the property involved in this action are the best evidence of its fair market value. To the extent that other properties were actually comparable to the property involved in this action, their sales are the best evidence indicative of its fair market value. You are instructed, however, that the extent of comparability or non-comparability of the sales testified to here is for you to determine and weigh. * * *
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> * * * * *
>
> You must before considering the weight of the opinion of such witness first find from the evidence that the facts upon which his opinion is based are true. * * *

The proposed instruction refused was appellants' proposed instruction 16 (Br. 10):

> In this case evaluation experts have been called by both sides, and have testified as to the factors considered by them

> in arriving at their opinion as to the market value of the land condemned. The factors considered by the expert are not in themselves direct evidence of the fair market value of the land condemned, but may be considered by you only for the purpose of determining the weight, if any, to accord to the testimony of the expert in his ultimate opinion as to the fair market value of the land in question as to the date of taking.

Appellants objected to the first (Tr. 932-933, 956) but not to the second, saying to the court (Tr. 937): "I guess you're right. I see what you mean: Insofar as it's based upon facts of evidence that he's given. I withdraw the objection." The second is not therefore basis for complaint on appeal, although correct in the context made, as shown below, infra, pp. 46-47. 21/

The first quoted instruction regarding evidence of sales was of course plainly correct. As previously discussed, in the absence of recent voluntary sales of the condemned property itself, the "best evidence" of value available is

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21/ United States v. Benning, 330 F.2d 527, 535 (C.A. 9, 1964); Parks v. United States, 293 F.2d 482, 486-487 (C.A. 5, 1961); Western Fire Ins. Co. of Fort Scott, Kan. v. Word, 131 F.2d 541, 543-544 (C.A. 5, 1943).

the prices at which comparable lands in the vicinity changed hands at about the time of the taking. "It is settled law that comparable sales are the best evidence of value." United States v. Whitehurst, 337 F.2d 765, 775 (C.A. 4, 1964), and cases cited there; Bailey v. United States, 325 F.2d 571, 572 (C.A. 1, 1963); United States v. Featherston, 325 F.2d 539, 542 (C.A. 10, 1963. Featherston and the recent case of United States v. 60.14 Acres in Warren and McKean Counties, Pa. (Seibel) (C.A. 3, No. 15313, June 24, 1966), not yet reported, also show the federal rule to be that appraisal experts may testify to such sales as an exception to the hearsay rule.

Relative to appellants' refused instruction, we believe the instructions given, considered together, informed the jury of that part of its substance which was applicable to this case. The court here instructed (Tr. 948): "You may also take into consideration other bona fide sales of property in the immediate vicinity and similarly located within a reasonable time near the date of taking * * *." It was in the context of explaining expert testimony and the evaluation of it by the jury that the court stated (Tr. 949): "You must

before considering the weight of the opinion of such witness first find from the evidence that the facts upon which his opinion is based are true. You are not bound by any opinion testimony, and it should be considered by you in connection with all other evidence, it should be given such weight as you believe it is entitled to receive." There was this further instruction (Tr. 952):

> In determining the weight to be given to the testimony of each valuating witness, you may and should consider his education, experience, knowledge and investigation of all facts and circumstances pertaining not only to the property in question but also his knowledge and investigation of sales of other properties in the area. You should also consider the manner in which the witness has applied his knowledge of the facts and circumstances concerned in arriving at his market value. If you believe that an opinion of any witness was expressed without sufficient investigation in order to inform him about all of the material facts or without sufficient knowledge of the material facts before him to form a just opinion, or if you find that he has given erroneous facts, or if you believe the reasons advanced by him for his opinion are unsound, you may entirely disregard his opinion or you maygive it such weight as in your judgment you think it merits, after considering all the evidence before you.

Considered as a whole, these instructions embraced the material substance of appellants' proposed instruction. There is no record indication that the court, counsel for the parties, or witnesses claimed in the course of this proceeding that sales referred to as "factors" to support their value opinions were used as "direct" evidence of value (Br. 48). Certainly, no error and no prejudice can be assigned for refusing to give appellants' proposed instruction literally. Brown v. Chapman, 304 F.2d 149, 154 (C.A. 9, 1962); United States v. Baker, 279 F.2d 603, 604-606 (C.A. 9, 1960); Harwell v. United States, 316 F.2d 791, 794 (C.A. 10, 1963).

CONCLUSION

The appeal should be dismissed because the notice of appeal was not timely filed. If the merits are considered, th judgment should be affirmed for the foregoing reasons.

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CERTIFICATE OF EXAMINATION OF RULES

I certify that I have examined the provisions of Rules 18 and 19, of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the tendered brief conforms to all requirements.

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